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No. 89-1357

In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS W. HILL, PETITIONER

v.

PAUL S. BRITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether respondent's notice of appeal was timely filed.

2. Whether the court of appeals correctly concluded that petitioner's *Bivens* claim against his former supervisor was precluded by the Civil Service Reform Act of 1978.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34-45) is reported at 884 F.2d 1318. The district court's memorandum opinion and order granting in part and denying in part respondent's motion to dismiss (Pet. App. 15-33) is unreported. The district court's orders denying respondent's motion to supplement the motion to dismiss and setting the case for trial (App., *infra*, 1a-2a) also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1989. A petition for rehearing was denied on October 6, 1989 (Pet. App. 46-48). The petition

for a writ of certiorari was filed on January 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a civilian employee of the Air Force from January 1966 to July 1985. Immediately prior to the termination of his employment, he was assigned to Kirtland Air Force Base, New Mexico, where he worked in the Directorate of Aerospace Studies. In May 1985, the Air Force served him with a notice of proposed removal from the federal service based on his alleged misuse of government long distance telephone service and his unauthorized removal of records from the desk of a prior supervisor. For the same reasons, the Air Force determined that petitioner was untrustworthy and suspended his top secret security clearance. In July 1985, petitioner's employment was terminated. Pet. App. 2-3, 7; Gov't C.A. Br. 3-4.

2. Petitioner appealed his removal to the Merit Systems Protection Board (MSPB). The MSPB "fully adjudicated" his discharge claim, resulting "in a finding by the MSPB of misconduct" by petitioner and a determination that petitioner's " 'misconduct related to his integrity and trustworthiness.' " *Hill* v. *Department of Air Force*, 844 F.2d 1407, 1413 (10th Cir.) (quoting MSPB Mem. Op. at 24), cert. denied, 488 U.S. 825 (1988). The MSPB decision was affirmed by the Federal Circuit. *Hill* v. *Department of Air Force*, 818 F.2d 874 (1987) (Table).

3. Petitioner also filed suit against the Air Force and against two of his former military supervisors, one of whom was respondent. Petitioner alleged seven different causes of action. In his fourth cause of action, he requested that his security clearance be

restored and that a negative notation—known as a "Z Code" modifier—be removed from his records. The district court granted the motion for a preliminary injunction. Pet. App. 14; Gov't C.A. Br. 5. The court of appeals reversed. *Hill* v. *Department of Air Force*, 844 F.2d 1407 (10th Cir.), cert. denied, 488 U.S. 825 (1988). Noting that petitioner "lost his job because of misconduct," the court held that petitioner "did not have a constitutional property or liberty interest in his security clearance." 844 F.2d at 1410, 1411.

4. In petitioner's fifth cause of action, he raised a *Bivens* claim against respondent.[1] Petitioner alleged that respondent violated petitioner's due process rights by interfering with petitioner's security clearance and future job possibilities and by collecting and disseminating to superiors and other agency officials information concerning petitioner that was false and injurious to his reputation. Pet. App. 20-21, 36. Petitioner also alleged that respondent violated his constitutional rights to due process and to privacy by "taking" petitioner's personal phone conversations—*i.e.*, by eavesdropping on those conversations from adjacent offices or the hallway or by ordering others to do so. *Id.* at 21, 36; Gov't C.A. Br. 13-15.

On September 30, 1986, respondent filed a motion to dismiss arguing, *inter alia*, that he was entitled to qualified immunity and that the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.), precluded the *Bivens* action. Pet. App. 23, 36. On September 21, 1987, the district court denied the motion to dismiss the *Bivens* action. The court

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[1] See *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

held that the CSRA did not preclude the action (*id.* at 23-29), but did not address the issue of qualified immunity.[2]

On June 29, 1988, respondent moved to supplement his motion to dismiss, bringing to the court's attention the fact that it had not ruled on his qualified immunity defense to the constitutional claims. Gov't C.A. Br. 6. On October 14, 1988, the district court denied the motion to supplement. App., *infra*, 2a. On the previous day (October 13, 1988), the district court had set the case for trial. App., *infra*, 1a. On November 9, 1988, respondent filed a notice of appeal from both the October 13 and the October 14, 1988 orders. Gov't C.A. Br. 7.

5. In July 1989, the court of appeals reversed the district court's orders refusing to dismiss the *Bivens* action and setting the case for trial. Pet. App. 34-45. The court initially noted that "[i]t is well settled that a court of appeals has jurisdiction to consider an interlocutory appeal involving an issue of qualified immunity" and that "[respondent's] interlocutory appeal is properly before this court, because his qualified immunity claim was apparently denied by the district court." *Id.* at 37. The court then concluded that, because "no *Bivens* remedy" was available "under the circumstances of this case," it was unnecessary to "address the qualified immunity issue." *Id.* at 38.

The court of appeals determined that the CSRA precludes petitioner's *Bivens* claim. Reviewing this Court's decisions in *Bush* v. *Lucas*, 462 U.S. 367

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[2] In its September 21, 1987 order, the district court also granted the motion by respondent and another defendant to dismiss the first and fifth causes of action to the extent that they alleged common law and Federal Tort Claims Act claims. Pet. App. 33.

(1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), the court concluded that those decisions "provide that courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has not inadvertently omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies." Pet. App. 40-41 (internal quotation marks omitted). The court observed that two other circuits had "applied the reasoning of *Chilicky* and *Bush* to situations similar to [petitioner's] * * * and concluded [that] there was no *Bivens* remedy." Pet. App. 41 (citing *Spagnola* v. *Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc), and *McIntosh* v. *Turner*, 861 F.2d 524 (8th Cir. 1988)). Agreeing with the holdings and reasoning of those decisions, the court concluded that petitioner could not maintain a *Bivens* action for allegations of prohibited personnel practices under the CSRA, and that interference with security clearances and with job possibilities were prohibited personnel practices. *Id.* at 42-43.

The court also concluded that, even though, in its view, eavesdropping was "not * * * a listed prohibited personnel practice" under the CSRA (Pet. App. 43), the Act precludes petitioner's *Bivens* claim that the alleged eavesdropping constituted a violation of his constitutional right to privacy. The court noted that "[t]he nature of the particular constitutional injury played little role in the Supreme Court's reasoning in *Bush*," and that "the Court focused on the special factor of federal employment." *Ibid.* The court further emphasized that, in light of *Chilicky*, "*Bush* even extends to plaintiffs who have no remedy under the Civil Service Reform Act." *Id.* at 43-44. Finally, the court observed that petitioner "received

full due process, under the comprehensive statutory scheme, after he contested his loss of employment." *Id.* at 44. Accordingly, the court ordered that the fifth cause of action be dismissed with prejudice.[3]

ARGUMENT

Petitioner raises two issues. First, he asserts that the appeal was not timely filed. Second, he maintains that the court of appeals erred in determining that a *Bivens* cause of action cannot be maintained in the circumstances of this case. Neither contention is well founded, and neither warrants review.

1. Petitioner argues (Pet. 7-12) that respondent's notice of appeal, filed on November 9, 1988, was untimely. Petitioner contends that respondent waived the qualified immunity issue by not raising it in his original motion; alternatively, petitioner suggests that, if it was raised, the notice was due 60 days after September 21, 1987, when the district court issued its order denying respondent's motion to dismiss the fifth cause of action. Petitioner's arguments are meritless.

Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides that, in a civil case in which the United States or an officer of the United States is a party, an appeal must be made within 60 days "after the date of entry of the judgment or order appealed from." In his supplemental motion to dismiss, respondent, an officer of the United States, pointed out to the district court its failure to address his defense of qualified immunity and sought dismissal on the basis of that defense. He then filed a notice of appeal within 60 days after the entry of the district

[3] At the present time, the only claim that has not been dismissed in this action is a claim under the Privacy Act.

court's orders setting the case for trial and denying his supplemental motion. Respondent thus clearly complied with the applicable rule. Petitioner suggests that respondent failed to raise the qualified immunity issue in his initial motion to dismiss, and that respondent should not have been permitted to appeal from the denial of the supplemental motion. Pet. 4-5, 9. But the court of appeals explicitly determined that respondent's "motion to dismiss alleg[ed] absolute and qualified immunity" (Pet. App. 36), and that the district court had simply failed to consider the qualified immunity issue in its September 21, 1987 order addressing that motion. See *id.* at 36-37 ("The district court dismissed part of the fifth cause of action on absolute immunity grounds. It did not discuss qualified immunity."). Contrary to petitioner's contention, respondent's appeal was timely filed.[4]

2. Petitioner also maintains (Pet. 13-17) that the court of appeals erred in concluding that the CSRA precludes his *Bivens* claim. The court of appeals' conclusion, however, is correct, and does not conflict

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[4] In view of the specific procedural background of this appeal, there is no merit to petitioner's contention (Pet. 7-10) that a conflict exists between the instant decision and *Kenyatta* v. *Moore*, 744 F.2d 1179 (5th Cir. 1984), cert. denied, 471 U.S. 1066 (1985). The *Kenyatta* court emphasized that the defendants could not rely on the district court's denial of the defendants' second motion for summary judgment to trigger the 60 days for filing a notice of appeal with respect to the absolute immunity claim because "the issue had been previously decided" by the district court and because the defendants' second summary judgment motion only "nominally reiterated" that claim (744 F.2d at 1187). Here, in contrast, the district court *never* specifically addressed the qualified immunity claim.

with any decision of this Court or any other court of appeals.

The court of appeals determined that, under this Court's decisions in *Bush* v. *Lucas* and *Schweiker* v. *Chilicky*, no *Bivens* remedy should be inferred as a supplement to the CSRA remedies afforded by Congress. Petitioner's allegations that respondent impermissibly interfered with petitioner's security clearances and job possibilities are unquestionably allegations of prohibited personnel practices. Pet. App. 42 (citing 5 U.S.C. 2302). The Tenth Circuit's conclusion that the CSRA precludes a *Bivens* action concerning such practices is consistent with the unanimous view of other courts of appeals.[5] Indeed, the district court's contrary analysis of this question was issued before this Court's decision in *Schweiker* v. *Chilicky*. Two of the court of appeals decisions cited by the district court (Pet. App. 24) to support its analysis were subsequently vacated and decided differently after *Chilicky*;[6] a third was explicitly disavowed in the wake of *Chilicky*.[7] As the Tenth Circuit and other courts of appeals have concluded, Congress explicitly addressed the problem of prohibited

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[5] See, *e.g.*, *Feit* v. *Ward*, 886 F.2d 848 (7th Cir. 1989); *Volk* v. *Hobson*, 866 F.2d 1398 (Fed. Cir.), cert. denied, 109 S. Ct. 2425 (1989); *Kotarski* v. *Cooper*, 866 F.2d 311 (9th Cir. 1989); *McIntosh* v. *Turner*, 861 F.2d 524 (8th Cir. 1988); *Spagnola* v. *Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc).

[6] See *Spagnola*, 859 F.2d at 224; *Kotarski*, 866 F.2d at 311-312.

[7] See *Feit* v. *Ward*, 886 F.2d at 855-856 (disapproving *Egger* v. *Phillips*, 710 F.2d 292 (7th Cir.), cert. denied, 464 U.S. 918 (1983)).

personnel practices, and courts should not supplement that scheme with *Bivens* remedies.[8]

Moreover, the same result is required with respect to petitioner's eavesdropping/privacy claim even though the court of appeals determined that such a claim is not a prohibited personnel practice. As the *Spagnola* court explained (859 F.2d at 228), *Chilicky* makes clear that "*Bush* extends even to those claimants within the system for whom the CSRA provides 'no remedy whatsoever.'" 859 F.2d at 228. In other words, since the CSRA is a comprehensive regime governing the relationship between federal employees and their superiors, Congress's carefully constructed system should not be supplemented by implied judicial causes of action. "When the design of a govern-

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[8] The court of appeals ruled that, because the interlocutory appeal of the order apparently denying qualified immunity was properly before it, the court could address the related, dispositive issue of the availability of a *Bivens* remedy. That ruling is in accord with the decisions of other courts of appeals. See Pet. App. 37-38 (citing *Carlson* v. *Conklin*, 813 F.2d 769, 770-771 (6th Cir. 1987) and *Bolden* v. *Alston*, 810 F.2d 353, 356 (2d Cir.), cert. denied, 484 U.S. 896 (1987)). See also *Drake* v. *Scott*, 812 F.2d 395, 399, modified on other grounds, 823 F.2d 239 (8th Cir.), cert. denied, 484 U.S. 965 (1987). Two courts of appeals, however, have suggested a contrary view. See *Siegert* v. *Gilley*, 895 F.2d 797, 800 (D.C. Cir. 1990); *Todd* v. *United States*, 849 F.2d 365, 368 (9th Cir. 1988). But see *Le Bid* v. *Hanson*, 894 F.2d 1124, 1126 (9th Cir. 1990) (citing lack of *Bivens* remedy as alternative basis for reversal on interlocutory appeal of denial of qualified immunity). But both the *Siegert* and *Todd* decisions held that the defendant was entitled to qualified immunity, and thus the discussion regarding the appealability of closely related, potentially dispositive issues did not affect the outcome on appeal. In any event, petitioner has not raised this question, and it therefore need not be considered by this Court. Sup. Ct. R. 14.1(a).

ment program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [this Court has] not created additional *Bivens* remedies." *Schweiker* v. *Chilicky*, 108 S. Ct. at 2468. Hence, the court of appeals correctly held that it could not create a *Bivens* damages remedy for such a claim.[9]

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[9] Petitioner's suggestion (Pet. 13) that the court of appeals' decision is in conflict with *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), is incorrect. As an initial matter, petitioner confuses *application* of the qualified immunity standard in a *Bivens* action with the threshold question addressed by the court of appeals (whether a *Bivens* action may be maintained at all). As the court of appeals concluded, in view of Congress's comprehensive treatment of the federal employment relationship, petitioner cannot succeed on the threshold question. Even if the qualified immunity issue itself were considered, however, it is clear that respondent's conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Petitioner "did not have a constitutional property or liberty interest in his security clearance" (*Hill* v. *Department of Air Force*, 844 F.2d at 1411), nor did he have a constitutionally protected interest with respect to future employment. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (to have a property interest in a job, an individual "must have more than a unilateral expectation of it"). Moreover, respondent's alleged collection of information and dissemination to other agency officials violated no clearly established rights. See *Hill* v. *Department of Air Force*, 844 F.2d at 1412 ("The Air Force could not, and should not, be prohibited from communicating to prospective employers who do work for the government the facts underlying [petitioner's] discharge."). Finally, petitioner's eavesdropping/privacy claim consists of allegations of overhearing of his workplace telephone conversations from adjacent offices and the hallway; no decision clearly establishes that an indi-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1990

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vidual can have a reasonable expectation of privacy in these circumstances.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CV 85-1485 JB

THOMAS W. HILL, PLAINTIFF,

vs.

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT and PAUL J. VALLERIE, DEFENDANTS.

[Filed: Oct. 13, 1988]

MINUTE ORDER

BY DIRECTION OF THE HONORABLE JUAN G. BURCIAGA:

IT IS ORDERED that the captioned case is set for *JURY TRIAL* on the jury issues only on *MONDAY, DECEMBER 12, 1988, AT 9:30 A.M.*, Courtroom 13-West, 13th Floor, U.S. Court House, 500 Gold, SW, Albuquerque, New Mexico.

Requested Jury Instructions are due to the Court on *WEDNESDAY, DECEMBER 7, 1988.*

JESSE CASAUS
Clerk

By /s/ Linda Ward
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF,

v.

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT and PAUL J. VALLERIE, DEFENDANTS.

[Filed: Oct. 14, 1988]

ORDER

THIS MATTER having come on for consideration of Defendants' Supplement To Defendants' Motion To Dismiss Cause of Action V (Docket 333), and the Court having reviewed the memoranda of the parties and being otherwise fully advised in the premises, finds that the motion is not well taken and will be denied.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' Supplement To Defendants' Motion To Dismiss Cause of Action V (Docket 333) be and hereby is denied.

DATED this 13th day of October, 1988.

/s/ Juan G. Burciaga
United States District Judge

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